

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION**

ERICA R. BARRETT, KATHLEEN D.)
VINCENT, CONNIE ENDERLE, EDWARD)
Q. INGERSON, II, PENNY M. KENOYER)
and GILBERT J. ONTIVEROS, individually)
and on behalf of all others similarly situated,)

Plaintiffs,

v.

O'REILLY AUTOMOTIVE, INC., THE)
BOARD OF DIRECTORS OF O'REILLY)
AUTOMOTIVE, INC., O'REILLY)
AUTOMOTIVE 401(K) PLAN)
INVESTMENT COMMITTEE and JOHN)
DOES 1-30,)

Defendants.

Case No. 6:22-3111-CV-S-BCW

**DEFENDANTS' MOTION FOR LEAVE TO FILE NEW
RELEVANT AUTHORITY IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS THE FIRST AMENDED CLASS ACTION COMPLAINT**

Defendants O'Reilly Automotive, Inc. ("O'Reilly"), the Board of Directors of O'Reilly Automotive, Inc., the O'Reilly Automotive 401(k) Plan Investment Committee, and John Does 1-30 (collectively, "Defendants") hereby request leave to file the attached new relevant authority in support of Defendants' Motion To Dismiss The First Amended Class Action Complaint. (ECF No. 26.) In support of this Motion for Leave, Defendants state:

1. On September 2, 2022, Defendants filed their motion to dismiss the first amended complaint and suggestions in support. (ECF Nos. 26 and 27.) Plaintiffs filed their suggestions in opposition on September 23, 2022. (ECF No. 33.) On October 7, 2022, Defendants filed their reply suggestions. (ECF No. 36.)

2. On October 12, 2022, following the completion of briefing in connection with Defendants' Motion to Dismiss, the Eighth Circuit Court of Appeals issued a decision in *Matousek v. MidAmerican Energy Company*, No. 21-2749, 2022 WL 6880771 (8th Cir. Oct. 12, 2022), a copy of which is attached hereto as Exhibit A. In *Matousek*, the Eighth Circuit affirmed the dismissal of an ERISA breach of fiduciary complaint based on nearly identical allegations as those in the above-referenced action. *Id.* at *1-2. In particular, the plaintiffs in *Matousek* -- participants in MidAmerican's 401(k) plan -- alleged that defendants breached the fiduciary duty of prudence by maintaining high-cost and underperforming funds in the plan and by allowing plan participants to pay excessive recordkeeping costs. *Id.* The Eighth Circuit held that those allegations could not "clear[] the pleading bar" because the plaintiffs, like Plaintiffs here, failed to allege a "meaningful benchmark." *Id.* at *4-5. Defendants respectfully submit that *Matousek's* holdings regarding the same conduct as alleged here support the arguments made in Defendants' pending Motion to Dismiss. *Id.* at *2-5.

WHEREFORE, Defendants respectfully request that the Court grant this request for leave to file the attached *Matousek v. MidAmerican Energy Co.* opinion as new relevant authority in support of Defendants' Motion To Dismiss The First Amended Class Action Complaint. (ECF No. 26.)

Dated: October 21, 2022

Respectfully submitted,

/s/ James R. Carroll

Charles B. Cowherd Mo. Bar No. 27087

SPENCER FANE LLP

2144 E. Republic Road, Ste. B300

Springfield, Missouri 65804

Telephone: 417-888-1000

Facsimile: 417-881-8035

ccowherd@spencerfane.com

James R. Carroll (admitted *pro hac vice*)

Michael S. Hines (admitted *pro hac vice*)

Mary E. Grinman (admitted *pro hac vice*)

SKADDEN, ARPS, SLATE

MEAGHER & FLOM LLP

500 Boylston Street

Boston, Massachusetts 02116

Telephone: 617-573-4800

Facsimile: 617-573-4822

james.carroll@skadden.com

michael.hines@skadden.com

mary.grinman@skadden.com

Counsel for Defendants

*O'Reilly Automotive, Inc., The Board of Directors
of O'Reilly Automotive, Inc., The O'Reilly
Automotive 401(k) Plan Investment Committee, and
John Does 1-30*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was filed electronically with the United States District Court for the Western District of Missouri, Southern Division, on this 21st day of October, 2022, with notice of case activity generated and sent electronically to all counsel of record.

/s/ James R. Carroll